IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2679 OF 2003

AND

NOTICE OF MOTION NO.2743 OF 2004

IN

SUIT NO.2889 OF 2003

Lorna D'Souza. ... Plaintiff

vs.

Lalit D'Souza & others. .... Defendants.

Mr.M.M.Vashi, for Plaintiff.

Mr.M.P.Deshpande i/b. Mr.Bhandary, for Defendant nos.1 and 3

Mr.H.N.Thakore with Ms.Chanda S. i/b. M/s.Thakore Jariwalla & Associates, for Defendant no.2.

CORAM: D.K.DESHMUKH,J.

DATED: 18th August,2005

P.C.:-

1. The Notice of Motion no.2679 of 2003 is taken out by the plaintiff whereas the Notice of Motion no.2743 of 2004 is taken out by

defendant no.2. In both the Notices of Motion almost same reliefs are claimed. The plaintiff has filed the suit for administration of the estate of her deceased father Mr.Timothy Peter D'Souza. Defendant no.1 is brother of the plaintiff, defendant nos.2 and 3 are her sisters. The properties left behind by the deceased are described at Exhibit B. Presently the defendant no.1 claims to be in possession of those properties because according to him, he is the executor of the Will left behind by the deceased. The defendant no.1 has also taken out the proceedings for probate of the Will. According to the plaintiff and defendant no.2, the defendant no.1 cannot claim to be an executor of the Will. In fact according to them, the defendant no.1 cannot claim anything on the basis of the alleged Will left behind by their father. It is submitted that according to the Will of the deceased all the properties which are described in Exhibit B including the business being conducted there, was owned by the testator at the time of his death. However, the defendant no.1 in his reply that is filed in the Court, is setting up his own title contrary to the claim made in the Will. In so far as the property at Item no.1 is concerned, the defendant no.1 claims that he was carrying on the business in partnership with his father and that tenancy of the premises was on his own name. Similar claim is made by him in relation to the other properties. The learned Counsel appearing for plaintiff relying on the judgment of the Supreme Court in the Case “Mst.Bhagwani Kuer (dead) and others Vs. Smt.Tapeswari

Kuer (dead) and others, AIR 1973 Supreme Court 2583" submits that the defendant no.1 cannot claim benefit under the Will unless he complies with all the conditions in the Will and accepts what is stated in the Will.

2. On the other hand it is stated on behalf of defendant no.1 that whatever claims he has made in the affidavit in relation to the properties at Exhibit B are correct and he is entitled to those properties even independent of the Will and therefore, relying on the judgment of the Supreme Court in the case "Valliammai Achi Vs. Nagappa Chettiar and another, AIR 1967 Supreme Court 1153 (V 54 C 240)" it is submitted that the defendant no.1 can set up a claim contrary to the recitals in the Will.

3. Now in the light of these rival submissions if the record is perused, it is clear from the Will that the testator has appointed defendant no.1 as executor of the Will. In the Will clear statement has been made that the properties which are described in the Will are owned by the testator. Perusal of the Affidavit-in-reply filed by defendant no.1 shows that the defendant no.1 is disputing the claim made by the testator in the Will, and he is claiming to be the owner of the business. He is also claiming to be the tenant of the premises. The defendant no.1 is thus putting up substantially a claim contrary to

what is contained in the Will. The Supreme Court in the judgment in the case “Valliammai Achi Vs. Nagappa Chettiar and another, AIR 1967 Supreme Court 1153 (V 54 C 240)” referred to above has quoted briefly the following passage from the “Halsbury's Laws of England, Third Edition, Volume 14 at page 588” which reads as follows:-

> “Where a testator by his will purports to give property to A which in fact belongs to B and at the same time out of his own property confers benefits on B... in such circumstances... B is not allowed to take the full benefit given him by the Will unless he is prepared to carry into effect the whole of the testator's dispositions. He is accordingly put to his election to take either under the instrument or against it. If he elects to take under the Will he is bound and may be ordered to convey his own property to A; if he elects to take against the Will and to keep his own property and so disappoints A, then he cannot take any benefits under the Will without compensating A out of such benefits to the extent of the value of the property of which A is disappointed.

It is clear from the above quoted passage that in order to claim benefit

under the Will the defendant no.1 will have to accept the correctness of the statements made in the Will. He cannot claim benefits under the Will while disputing the correctness of the statements made in the Will. Therefore, it prima facie appears that the defendant no.1 will not be able to claim exclusively the properties at Exhibit B. The plaintiff and defendant no.2 claims that the Receiver on the properties sould be appointed. Considering the conduct of the defendant no.1 in my opinion, the plaintiff and defendant no.2 are justified in seeking that order. Perusal of the list of the properties at Exhibit B shows that many of the properties are the Restaurants and some are the buildings which are occupied by the tenants. The learned Counsel for defendant no.1 states before me that the Restaurants at item nos. 1, 3, 4 and 5 have been given on conducting basis and that the defendant no.1 is running the restaurant described at item no.2. Taking overall view of the matter therefore, in my opinion, following order would meet the ends of justice:-

(i) Both the Notice of Motion are granted in terms of prayer clause (e) of the Notices of Motion no.2679 of 2003, restricted to the properties which are described in Exhibit B to the plaint.

(ii) It is directed that the Receiver shall first take inventory of all the properties except the properties described at item nos.2 and 11 and submit the report to the Court. After the Receiver submits the report, the parties shall be entitled to move the Court for further reliefs.

(iii) So far as the properties at Item nos.2 and 11 are concerned, the Receiver shall take initially symbolic possession and take steps to appoint agent to be in possession of the properties during the pendency of the suit. For that purpose the Receiver shall call for bids from the parties to the suit and shall appoint the highest bidder among them as his agent to be in possession of the properties on usual terms and conditions including the security and royalty. Till the Receiver takes possession of the properties at Sr.no.2 and 11 and until further orders, ad-interim order in terms of prayer clause (d) shall operate.

(iv) So far as item no.6 in "Exhibit C" is concerned, the Receiver shall stand appointed in relation to the Locker no.6279 in the Union Bank, Fort, Mumbai. The Receiver shall make inventory of the items found in the locker and shall submit the report to the Court. Parties shall be at liberty to take out appropriate proceedings for seeking appropriate reliefs.

Both the notices of motion are disposed of.

At this stage, a request is made for stay of the order. The request is rejected.

Parties to act on the ordinary copy of the order duly authenticated by the Associate/Personal Secretary of this Court.